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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IV

DIPLOMATIC PROTECTION

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CHAPTER IV

DIPLOMATIC PROTECTION

A. Introduction

1. The Commission at its forty-eighth session, in 1996, identified the topic of "Diplomatic protection" as one of three topics appropriate for codification and progressive development. [1] In the same year, the General Assembly by its resolution 51/160 invited the Commission further to examine the topic and to indicate its scope and content in the light of the comments and observations made during the debate in the Sixth Committee and any written comments that Governments may wish to make. At its forty-ninth session, in 1997, the Commission pursuant to that General Assembly resolution, at its 2477th meeting established a Working Group on the topic. [2] The Working Group submitted a report at the same session which was endorsed by the Commission. [3] The Working Group attempted to: (a) clarify the scope of the topic to the extent possible; and (b) identify issues which should be studied in the context of the topic. The Working Group proposed an outline for consideration of the topic which the Commission recommended to form the basis for the submission of a preliminary report by the Special Rapporteur. [4] The Commission also decided that it should endeavour to complete the first reading of the topic by the end of the present quinquennium.

2. At its 2501st meeting on 11 July 1997, the Commission appointed Mr. Mohamed Bennouna Special Rapporteur for the topic.

3. The General Assembly in paragraph 8 of its resolution 52/156 adopted on 15 December 1997 endorsed the decision of the Commission to include in its agenda the topic "Diplomatic protection".

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[1] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 249 and addendum 1.

[2] Ibid., Fifty-second Session, Supplement No. 10 (A/52/10), Chapter VIII.

[3] Ibid., para. 172.

[4] Ibid., paras. 189-190.

B. Consideration of the topic at the present session

4. At the present session, the Commission had before it the preliminary report of the Special Rapporteur (A/CN.4/484).

5. The Commission considered the preliminary report of the Special Rapporteur at its 2520th to 2523rd meetings from 28 April to 1 May 1998.

1. Introduction by the Special Rapporteur of his preliminary report

6. The preliminary report raised a number of basic issues which underlie the topic and on which the Special Rapporteur sought the views of the Commission. The issues were divided into two broad categories: (a) the legal nature of diplomatic protection; and (b) the nature of the rules governing diplomatic protection.

(a) The legal nature of diplomatic protection

(i) Origin of diplomatic protection

7. The Special Rapporteur, referring to the report of the Working Group of 1997 on this topic, noted that the topic of "Diplomatic protection" involved mainly codification and that its customary origin was shaped by the dictum in the *Mavrommatis Palestine Concessions* case. [5] Referring to the historical use of the institution of diplomatic protection, the Special Rapporteur referred to certain criticisms that had been made over time of diplomatic protection. Those criticisms include the assertions that the institution of diplomatic protection was discriminatory because only powerful States were able to use it against weaker States. According to this criticism, diplomatic protection was not egalitarian, since the possibility of the individual having his or her cause internationalized depended on the State to which that individual was linked by nationality. Other criticisms included the assertion that diplomatic protection had served as a pretext for

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[5] The Permanent Court of International Justice stated that:

> "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law. The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."

P.C.I.J., Series A, No. 2, Judgment of 30 August 1924, p. 12.

intervention in the affairs of certain countries. [6] The Special Rapporteur noted that the Calvo doctrine was formed to prevent abuse and to allow the foreign national to agree to be bound by the principle of equality with nationals who are subject to the sole jurisdiction of their courts alone.

8. The Special Rapporteur explained that at the heart of diplomatic protection there was a dispute between a host State and a foreign national whose rights have been denied and as a result who suffered injuries. If the foreign national was unable to internationalize the dispute and take it out of the sphere of local law, his or her State of nationality, at its discretion, could espouse the individual's claim by having it undergo a veritable "transformation" since only a State could invoke the responsibility of another State. He felt that this traditional view was based largely on a fiction of law because it was the damage inflicted on the foreign national which served to determine the responsibility of the host State and to assess the reparation due to the State of nationality. [7]

9. He further noted that in formulating the principle of exhaustion of local remedies in article 22 of the draft articles on State responsibility, [8] the Commission took into account the doctrinal debate as to whether the rule involved was "procedural" or "substantive". The Commission opted for the second view and consequently the responsibility of the host State would arise only after local remedies have been exhausted by individuals. In the Special Rapporteur's view it was unclear from the Commission's commentary, however, how such a right was transformed following local proceedings into a right of the State of nationality, so as to revert to the logic of diplomatic protection.

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[6] See the individual opinion of Judge Padilla Nervo in the *Barcelona Traction, Light and Power Company, Limited* case (Belgium v. Spain) Judgment of 5 February 1970, where he stated that "The history of the responsibility of States in respect to the treatment of foreign nationals is the history of abuses, illegal interference in the domestic jurisdiction of weaker States, unjust claims, threats and even military aggression under the flag of exercising rights of protection, and the imposing of sanctions in order to oblige a government to make the reparations demanded.", I.C.J. *Reports*, 1970, p. 246.

[7] See *Chorzow Factory*, P.C.I.J., Series A, No. 17, Judgment of 13 September 1928, p. 28.

[8] For article 22 and its commentary see, Yearbook ... 1997, vol. II (Part Two), pp. 30-50.

10. He also made reference to later developments where States through agreements recognized the right of the State of nationality to take action, including before an arbitral body, to enforce the rights accorded by the treaty to their nationals or where an individual was granted direct access to international arbitration. The Special Rapporteur believed that the above development and the fact that some legal personality was conferred on the individual, as the direct beneficiary of international law led to more clear-cut doctrinal queries concerning the relevance of the traditional view of diplomatic protection.

(ii) Recognition of the rights of the individual at the international level

11. The Special Rapporteur referred to the emergence of a large number of multilateral treaties recognizing the right of individual human beings to protection independently from the intervention by the States and directly by the individuals themselves through access to international forums. In this context he referred to the right of petition. He further referred to recognition of basic human rights as creating obligations *erga omnes* and creating an interest on the part of all States. [9] These developments, together with the proliferation of bilateral investment promotion agreements and the creation of claims commissions [10] whereby a national of one State could present a claim against another State, created a legal framework outside the traditional area of diplomatic protection.

12. The Special Rapporteur noted that, in general, domestic law of States does not provide any "right" to diplomatic protection for the nationals. Noting developments in some recent constitutions where the right to diplomatic protection appears to have been granted to nationals, he felt that such provisions in the constitutions expressed more a moral duty than a legal

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[9] See *supra* note 6, p. 32, paras. 33-34.

[10] Such as Iran-United States Claims Tribunal established by Algiers Agreement of 19 January 1981 and the United Nations Compensation Commission created by the Security Council resolution 692, of 20 May 1991.

obligation, since any decision on this matter by a State would be influenced by political considerations and the diplomatic relations between the States concerned.

(iii) The rights involved in diplomatic protection

13. The Special Rapporteur stated that it has been established that the State has a "procedural" right, which it may waive, to bring an international claim in order to protect its nationals when they have suffered injury as a result of a violation of international law. In keeping with this traditional view, a State is enforcing its own right. A more contemporary approach suggests that the State is simply an agent of its national who has a legally protected interest at the international level. Depending on whether one opted for the right of States or for the right of the national, one would be placing emphasis either on an extremely old custom, which gave sovereignty more than its due, even resorting to a fiction, or on progressive development of custom, taking account of reality by means of international recognition of human rights. The approach chosen will have practical implications for the formulations of the provisions under this topic.

(b) The question of "primary" and "secondary" rules

14. The Special Rapporteur sought the Commission's guidance as to whether the topic should be confined to secondary rules as recommended by the Working Group of 1997 or could it be more flexible since, in his view, international law could not be placed in watertight compartments of "primary" and "secondary" rules. Recalling that the recommendation by the Working Group and its approval by the Commission was due to the impasse the Commission had reached in its first attempt to codify the topic "Responsibility of States for damage to the person and property of aliens", the Special Rapporteur suggested another approach. According to this approach, the Commission would limit itself to secondary rules, and discuss primary rules only in the context of general categories and, where necessary, with a view to appropriate codification of secondary rules. Examples included situations of nationality link of natural or legal persons or grounds for exoneration from responsibility based on the conduct of the individual claimant. Accordingly, it would not be the granting of nationality that would be considered, but its applicability to another State. Similarly, it would not be the individual's

compliance with the host countries' legislation that would be considered, but the circumstances in which the individual's conduct constituted a ground for exonerating the host State.

15. The Special Rapporteur also suggested changing the title of the topic to "Diplomatic protection of person and property" which appeared more in line with its content. The new title would also clarify the distinction between this topic and those dealing with diplomatic and consular relations.

2. Summary of the debate

(a) General comments

16. It was generally agreed that topic dealt with an issue that was complex and of great practical significance and that there was hardly any other topic that was as ripe for codification as diplomatic protection and on which there was such a comparatively sound body of hard law.

17. A comment was made that much of international law regarding diplomatic protection had taken shape with the spread of economic, social and political ideas from Europe and North America to other parts of the world. In developing the law towards universal application, care must be taken to avoid undue reliance on outdated materials and, conversely, there was a constant need for modernization and for taking into account the attitudes of the newer States.

18. It was noted that the original purpose of the institution of diplomatic protection had been to mitigate the disadvantages and injustices to which natural and legal persons had been subjected. Hence, far from being an oppressive institution, diplomatic protection had at least partially rectified the injustices of a system that reduced the individual, and specifically the private individual, to the rank not of a subject of international law, but of a victim of violations of that law. Nor was diplomatic protection "in essence discriminatory". It was discriminatory in its exercise because it was almost exclusively the prerogative of the most powerful States. Therefore, it was important not to generalize unduly.

19. It was noted that it might be appropriate to establish guidelines or rules - such as nationality, meritorious claim, denial of justice or violation of fundamental human rights - with a view to preventing abuses of the foreign State's discretionary power to provide diplomatic protection.

20. Other views were expressed to the effect that despite some abuse in the history of diplomatic protection, the institution of diplomatic protection has been frequently used among States of equal status and often within the same region.

(b) The customary conception of diplomatic protection

21. Some members did not agree with the suggestion that a legal interest on the part of a State in the fate of its nationals involved a legal fiction. They contended that there was nothing wrong in the notion that a State might have such an interest. Diplomatic protection was a construction in the same sense as the concepts of possession and ownership were constructions. For that reason the diplomatic protection in the context of the *Mavrommatis* construct should not be considered a fiction. Some other members were not persuaded that the analogy to a legal fiction by the Special Rapporteur was misleading. In their view, law was made up of fictions or, in other words, of normative reconstructions of reality.

22. The view was also expressed that regardless of what it was called - fiction, novation, substitution - what was involved was a theoretical approach which was not relevant to the normative development of the subject. The main question, as the Special Rapporteur had rightly emphasized, was who held the right exercised by way of diplomatic protection - the State of nationality or the injured victims? Clearly, the answer, according to this view, must always be the State; and in principle its powers in that regard were discretionary. Diplomatic protection had always been a sovereign prerogative of the State as a subject of international law. Had it been otherwise, no agreement would have been concluded after the Second World War to indemnify for property that had been nationalized.

23. As to whether, in exercising diplomatic protection, a State was enforcing its own right or the right of an injured national the observation was also made that a person linked by nationality to a State was a part of its population and therefore one of the State's constituent elements. The protection of its nationals was a State's fundamental obligation, on the same plane as the preservation of its territory or the safeguarding of its sovereignty. At the same time the State was defending the specific rights and interests of the national that had been "injured" by another State. Therefore, no rigid distinction could be drawn between the rights of the State and the rights of its nationals; the two sets of rights were complementary and

could be defended in concert. It was further noted that a State had in general an interest in seeing that its nationals were fairly treated in a foreign country, but it was an exaggeration to suggest that, whenever a national was injured in a foreign State, the State of origin was also injured. In practice damages are measured in relation to the injury suffered by the individual and not by the State, as if the injury to the individual was in fact the cause of action.

24. It was also stated that it was important to determine who had the direct and immediate legal interest, the attributes and the powers to bring an international claim. According to one view, the State had no such direct and immediate interest. If that were the case, the rights in question would be ineluctable and could not be exercised at the State's discretion. For example, agreements on the protection of foreign investments gave persons, whether natural or legal, the legal capacity to bring an international claim. The same was true in the case of the Calvo clause, whereby the alien contractually declined diplomatic protection from his State of origin. In that case too, it was clear that only the individual had a direct and immediate interest in the claim. Consequently, the debate on the legal fiction regarding the holder of those rights led nowhere, and the Commission should instead focus on the rights and legal interests that were being protected.

25. According to another view, the State exercised vicariously a right originally conferred on the individual. Therefore, it would be necessary to distinguish clearly between the exercise of the right protected and the right itself. The State has a discretionary power to exercise diplomatic protection, despite the fact that the rights protected were not those of the State, but rather those of the injured individual. The Special Rapporteur also agreed that this distinction between the possession of the right and its exercise might be useful in order to reconcile the customary law in this matter and the new developments.

26. In this context a comment was made that the Commission may want to reconsider the issue of the discretionary right of the State to diplomatic protection with no right to the individual. On the other hand, the view was also expressed that in deciding whether to exercise diplomatic protection, in relation to a particular case, a State has to evaluate matters such as the overall interest of the State in the conduct of foreign policy and not simply

the interest of the individual citizen who may have been injured as the result of a wrongful act of another State. Hence the exercise of diplomatic protection should be at the discretion of the State.

27. It was noted that given the complexity of the issue, it would be inappropriate to burden the subject with theoretical concepts. For instance, the question of recognizing that the individual had the status of a subject of international law was highly contentious and should not be raised at this point. It would be better to adhere to the practice - particularly the judicial practice - whereby the individual was treated as a beneficiary of international law.

(c) The relationship between human rights and diplomatic protection

28. As regards the relationship between human rights and diplomatic protection a number of comments were made which expressed caution in assimilating the two institutions or establishing a hierarchy between them.

29. It was noted that while it was true that the law of diplomatic protection had existed long before the emergence of human rights as a term of art in international law, the two approaches existed in parallel, and their respective potentials overlapped only partially. To jettison diplomatic protection in favour of human rights would be, in some instances, to deprive individuals of a protection which they had previously enjoyed. Of course, human rights could now serve to buttress the diplomatic protection exercised by the State of nationality: some countries, for example, have relied wherever possible on a human rights argument in exercising diplomatic protection, as a claim based on human rights was clearly more appealing to many States than one based on an international minimum standard that had been a bone of contention throughout the nineteenth century and the first half of the twentieth century. In this context, it was noted that the traditional "*Mavrommatis* approach" to diplomatic protection thus had its strong points and should not be discarded without careful consideration of what was required in order to render the individual's rights effective. It was noted that the human rights approach could be allowed to permeate the Commission's further debate on the topic on a case-by-case basis, but the Commission must not continue to question the very underpinning of diplomatic protection in adopting such a focus.

30. The comment was made that the human rights system worked in a similar way to the principles of diplomatic protection: it was a condition of

admissibility that the claimant should exhaust any available local remedies, and States had the discretionary power of espousing a claim on behalf of an individual or corporation. The practice of the European Commission of Human Rights was very similar: there had been important cases of principle in which an individual had decided to withdraw his claim but the European Commission had declined to treat the claim as withdrawn because there was an objective interest in maintaining the standards of the public order of Europe. The Commission should therefore be careful not to adopt false polarities between human rights and diplomatic protection. The system of diplomatic protection should not be marginalized when no effective substitute was yet available.

31. A comment was also made that human rights and diplomatic protection were entirely distinct, and more thorough consideration of the question would reveal that diplomatic protection had traditionally concerned strictly patrimonial rights, whereas human rights concerned the very essence of personal freedom. The rights traditionally covered by diplomatic protection included most-favoured-nation treatment and performance requirements imposed upon enterprises - which were not the core concern of traditional human rights. This view was not shared by other members of the Commission. It was noted that while, in practice, diplomatic protection was most frequently invoked in cases where patrimonial rights were violated, other rights could likewise call it into play. It would therefore be too restrictive to assume that diplomatic protection dealt exclusively with damage to property.

32. The view was also expressed that it would be possible to strike a balance between diplomatic protection and the exigencies of human rights. This issue was particularly relevant in the context of the question of legal persons - a grey area which neither the Commission nor other bodies had explored in depth - but had instead contented themselves with citing the somewhat obscure *obiter dictum* of the International Court of Justice in the *Barcelona Traction* case. It was further noted that it was no coincidence, that at the level of the European system for protection of human rights, the rights closest to those of legal persons, namely, property rights, were dealt with not in the European Convention on Human Rights, but in a separate protocol thereto. Therefore, a new approach seemed to be gaining ground, and that would be the crucial aspect of the study to be conducted by the Special Rapporteur. In this context, it was, however, noted that the American

Convention on Human Rights set out the principle that no one could be arbitrarily deprived of his property, but that principle was closely tied in with the human rights of due process.

33. The comment was made that the difference between individual petition procedures in human rights cases and diplomatic protection was not as pronounced as it seemed to be. In some cases, an element of diplomatic protection could be an additional component in a human rights petition procedure. For instance, in the *Soering* case, [11] the German Government had brought a claim in the European Court of Human Rights on behalf of its national. The literature also recognized that there was at least a theoretical link between the two institutions.

34. It was observed that if injury to a foreign national involved a violation of a right recognized as a human right, nothing could prevent that foreign national's State of origin from espousing his or her claim. The practice in some countries had stressed that approach. If injury to aliens in the form of violations of human rights were excluded from the application of diplomatic protection, no effective remedy would be available in cases when an alien did not have access to procedures before an international human rights body. In most cases of violations of human rights of foreigners, however - such as unfair imprisonment or mistreatment - international procedures were not available, and it was accordingly vital to confirm the right of the State of origin to exercise diplomatic protection.

35. In analysing the relationship between human rights and diplomatic protection, attention was drawn to a situation of violation of human rights under a given regime where espousing the claim by the State under that regime did not fall within the ambit of diplomatic protection.

36. The Special Rapporteur stressed that he had never sought to contrast diplomatic protection and human rights. He had simply asserted that the concept of diplomatic protection, which predated the concept of human rights, could no longer be studied without taking careful account of the evolution of human rights in recent years. It was countries undergoing a transition to democracy that had the greatest interest in strengthening human rights, and thus in ensuring that account was taken of individuals in action by the State.

(d) Preconditions for the exercise of diplomatic protection

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[11] ECHR, *Soering* case, decision of 26 January 1989, Series A, No. 161.

37. It was stated that the necessary preconditions for diplomatic protection had been established in the *Mavrommatis* judgement. The first precondition was that there must be proof that an injury had been inflicted on a national; that the injury was a breach of international law; that it was imputable to the State against which the claim was brought; and, lastly, that a causal link existed between the injury inflicted and the imputation of the injury. There would thus be three main protagonists in an international claim for diplomatic protection: the subject whose person, property or rights had been injured; the State causing the injury; and the State espousing the claim. The second precondition for the exercise of diplomatic protection was that the injured subjects must have been unable to obtain satisfaction through domestic remedies which afforded the State an opportunity to avoid a breach of its international obligations by making timely reparation.

38. It was noted that the basis for the prior exhaustion of local remedies was empirical, and it was arguable that there was an implied risk principle which meant that there was no need to exhaust local remedies in the absence of any prior voluntary connection with the jurisdiction concerned. [12] A view was also expressed that the requirement of the exhaustion of local remedies entailed a further consequence that the model of subrogation could not be applied to diplomatic protection, as there was a fundamental change in the character of the right. It was further noted that the Commission would have to address the question as to whether the resort to an international body to

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[12]See for example in the *Case Concerning the Aerial Incident of July 27th 1955* (Israel v. Bulgaria) Preliminary Objections where in response to a preliminary objection by Bulgaria that the domestic jurisdiction of Bulgaria was not exhausted, Israel argued that there were a number of important limitations to the application of the exhaustion of local remedies rule:

> "[I]t is essential [...] that a link should exist between the injured individual and the State whose actions are impugned. ... [T]he rule is only applied when the alien, the injured individual, has created, or is deemed to have created, a voluntary, conscious and deliberate connection between himself and the foreign State whose actions are impugned. ... The victims [in this case] had no voluntary, conscious and deliberate connection with Bulgaria. To the contrary, such connection as they did have, if such it can be called, was involuntary, unknown and completely unpremeditated."

See ibid., I.C.J. *Pleadings*, 1959, pp. 533-534. The Court found that it was without jurisdiction on another ground and did not rule on other issues raised as preliminary objections including the exhaustion of local remedies requirement.

protect human rights must be considered a "local remedy", even though a simple textual interpretation could not answer the question in the affirmative.

39. In the context of local remedies, the question arose as to whether the minimum standard of treatment accorded to aliens under international law should be the sole standard. Should the standard of treatment not be defined by reference to domestic law, so as to avoid conferring privileged status on aliens? To be sure, application of either standard would give rise to controversy, given the cultural, social, economic and legal differences which might exist between the host State and the foreign State.

40. A comment was made that foreign investors were in a privileged position vis-à-vis nationals, as they had recourse to three procedures - domestic remedies, diplomatic protection and international arbitration - for the protection of their rights, whereas nationals could avail themselves only of domestic remedies.

41. It was further noted that the State defending its nationals could not, in the exercise of diplomatic protection, have recourse to the threat or use of force. Hence, an important contribution the Commission could make in its consideration of the topic was to identify what means were available to States in making their rights and the rights of their nationals effective in the context of diplomatic protection.

42. Questions were raised as to whether a State could exercise diplomatic protection in parallel with an international recourse taken directly by an injured individual or whether the State only had the right to exercise diplomatic protection after all other domestic modes of dispute settlement were exhausted.

(e) The question of "primary" and "secondary" rules

43. It was observed that theories and concepts such as the distinction between primary and secondary rules could not helpfully be discussed before addressing the institutions and rules of diplomatic protection. These points could be debated as they came up in specific contexts. It was felt that the broad meaning of diplomatic protection was clear: the important issues were

the admissibility of claims and the law relating to the prior conditions which had to be satisfied before claims were made. The 1997 report of the Working Group on Diplomatic Protection should be followed in this respect.

44. Comments were made that although the Commission was dealing with secondary rules and it would cause confusion if it pretended otherwise, the distinction between primary and secondary rules should not be used as an absolute test. Classification of a rule as primary or secondary would depend on the nature of the issue on a particular occasion. However, the question was not of overlap but of a double function of admissibility and merit with respect, for example, to the "clean hands" rule, certain issues of nationality, and the whole area of acquiescence and delay. Therefore, the Commission would be unable to consider, in the context of this topic, secondary rules in isolation. It must also touch on primary rules, as secondary rules, being procedural, were the means used to enforce rights conferred.

45. As regards which law governed diplomatic protection, it was generally agreed that it was international law. In this context, it was noted that some Governments in their constitutions committed themselves to their nationals to exercise diplomatic protection. The view was also expressed that such national laws did not affect the discretionary right of the State to exercise diplomatic protection.

46. It was also observed that there was room for progressively developing and significantly modernizing the law governing diplomatic protection. Even if the law of the State was taken as the starting point, it should be possible, with a view to progressive development of the law, to enhance the place of the individual in the context of diplomatic protection, particularly where indemnification was concerned.

47. The comment was made that the study of diplomatic protection must include study of the means for exercising it. The traditional machinery for peaceful settlement of disputes, particularly negotiation but also mediation, good offices and arbitration, should be considered as well as the question of countermeasures in the context of diplomatic protection.

48. As regards the title of the topic, a comment was made that it could perhaps be made more precise, but that could be done later in the light of the draft to be prepared.

(f) The relationship between the topics of "Diplomatic protection" and "State responsibility"

49. It was observed that it was important to remember that diplomatic protection was just one part of the vast field of international responsibility. As a means of giving effect to State responsibility, it created a relationship between two States: the "protector" State and the State against which action was being taken, which was viewed as responsible for an internationally wrongful act that had caused injury to a national of the "protector" State. The contemporary emphasis on protection of human rights - even though correct - should not obscure the fact that the State-to-State relationship was an essential element in determining the nature of diplomatic protection. In this context, it was also observed that the topics of diplomatic protection and State responsibility were linked in terms of reasoning: the State was responsible for any violation of international law which it had committed or had been attributed to it, as stated in Part One of the draft articles on State responsibility. If that first condition was met, a number of consequences arose (Part Two of the draft), the main one being the obligation to provide compensation. When the obligation to compensation was owed to a private individual, who, with rare exceptions, did not have the capacity to act at the international level, diplomatic protection came into play and thus proved to be an extension, a consequence and a component of the law of State responsibility.

50. Attention was also drawn to the problem of dealing with questions of direct damage to States, which, while clearly forming no part of the Commission's mandate, were nonetheless often inextricably bound up with questions of diplomatic protection in practice. Sometimes a particular case could represent both a direct and indirect State interest. An example of such a case was the *Rainbow Warrior* incident where New Zealand brought a claim regarding violations of its sovereignty, and on behalf of the Netherlands regarding a photographer who had lost his life in the incident, who had been treated as being of Netherlands nationality for the purposes of the settlement. Also the Chernobyl incident had involved direct economic losses by private individuals in a number of States, as well as the potential for the States themselves to bring claims for direct damage to their airspace, had they so wished. These examples involved actual or potential diplomatic

protection in respect of private interests. The fact that they were not exclusively concerned with private interests should not place them outside the purview of the Commission's consideration.

(g) Scope of the topic

51. A comment was made that consideration should be given to extending diplomatic protection to the nationals of a State who suffered damage, not while they were abroad but while they were in their own State, as a result of an internationally wrongful act caused by a foreign diplomatic mission or the officials of such a mission who enjoyed jurisdictional immunity and, consequently, could not be brought before the local courts. There was no reason why a State which protected its nationals when they were injured abroad as a result of a violation of international law in those circumstances should not do likewise if they were injured when resident on the national territory.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IV

DIPLOMATIC PROTECTION

Addendum

3. Establishment of a Working Group

[Insert A/CN.4/L.553 as orally amended by the Special Rapporteur]

The Commission at its 2544th meeting on 9 June 1998 considered and adopted the report of the Working Group.

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DIPLOMATIC PROTECTION

Report of the Working Group

1. The International Law Commission, at its 2534th meeting on 22 May 1998 established an open-ended Working Group, chaired by Mr. M. Bennouna, Special Rapporteur of the topic, to consider possible conclusions which might be drawn on the basis of the discussion as to the approach to the topic and also to provide directions in respect of issues which should be covered in the second report of the Special Rapporteur for the fifty-first session of the Commission.

2. The Working Group held two meetings from 25 to 26 May 1998. As regards the approach to the topic, the Working Group agreed to the following:

(a) The customary law approach to diplomatic protection should form the basis for the work of the Commission on this topic;

(b) The topic will deal with secondary rules of international law relating to diplomatic protection, primary rules shall only be considered when their clarification is essential to providing guidance for a clear formulation of a specific secondary rule;

(c) The exercise of diplomatic protection is the right of the State. In the exercise of this right, the State should take into account the rights and interests of its national for whom it is exercising diplomatic protection;

(d) The work on diplomatic protection should take into account the development of international law in increasing recognition and protection of the rights of individuals and in providing them with more direct and indirect access to international forums to enforce their rights. The Working Group was of the view that the actual and specific effect of such developments, in the context of this topic, should be examined in the light of State practice and insofar as they relate to specific issues involved such as the nationality link requirement;

(e) The discretionary right of the State to exercise diplomatic protection does not prevent it from committing itself to its nationals to exercise such a right. In this context, the Working Group noted that some domestic laws have recognized the right of their nationals to diplomatic protection by their Governments;

(f) The Working Group believed that it would be useful to request Governments to provide the Commission with the most significant national legislation, decisions by domestic courts and State practice relevant to diplomatic protection;

(g) The Working Group recalled the decisions by the Commission at its forty-ninth session, in 1997, to complete the first reading of the topic by the end of the present quinquennium.

3. As regards the second report of the Special Rapporteur, the Working Group suggested that it should concentrate on the issues raised in Chapter One "Basis for diplomatic protection" of the outline proposed by the last year Working Group.

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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

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A. Introduction

1. At its forty-ninth session, in 1997, the Commission decided to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[1] The General Assembly took note of this decision in paragraph 7 of resolution 52/156 of 15 December 1997.

2. The Commission appointed at the same session Mr. Pemmaraju Sreenivasa Rao Special Rapporteur for this part of the topic.[2]

B. Consideration of the topic at the present session

3. At the present session, the Commission had before it the Special Rapporteur's first report (A/CN.4/487 and Add.1), which it considered at its 2527th to 2531st meetings, held between 8 and 15 May 1998. A summary of the Commission's debate is to be found below.

4. At its 2531st meeting, on 15 May 1998, the Commission decided to refer to the Drafting Committee draft articles 1(a) (Activities to which the present articles apply)

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[1] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), para. 168.

[2] Ibid.

and 2 (Use of terms) recommended by the Commission's Working Group in 1996.[3]

5. At the same meeting, the Commission established a Working Group[4] to review draft articles 3 to 22 recommended in 1996 in light of the Commission's decision to focus first on the question of prevention. The purpose of such review was to

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[3] Ibid, *Fifty-first Session, Supplement No. 10* (A/51/10), annex I, p. 238. These articles read as follows:

Article 1
Activities to which the present articles apply

The present articles apply to:

(a) activities not prohibited by international law which involve a risk of causing significant transboundary harm [...]

through their physical consequences.

Article 2

Use of terms

For the purposes of the present articles:

(a) "risk of causing significant transboundary harm" encompasses a low probability of causing disastrous harm and a high probability of causing other significant harm;

(b) "transboundary harm" means harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border;

(c) "State of origin" means the State in the territory or otherwise under the jurisdiction or control of which the activities referred to in article 1 are carried out;

(d) "affected State" means the State in the territory of which the significant transboundary harm has occurred or which has jurisdiction or control over any other place where such harm has occurred.

[4] For the composition of the Working Group, see para.... above.

ascertain whether the principles of procedure and content of the duty of prevention were appropriately reflected in the text.

1. Presentation of the first report of the Special Rapporteur

6. The Special Rapporteur felt that, as a first step, it was necessary to address the questions of the scope and the content of the topic, which, as noted by the Commission's Working Group in 1997, remained unclear.[5] In this respect, he had thought it useful to review the work already accomplished with the aim of identifying various elements of the concept of prevention so far developed by the Commission which had also received support in the Sixth Committee.

7. The Special Rapporteur was of the view that the concept of prevention should be considered within the broader context of sustainable development, where it had found its most significant expression. He drew attention in this regard to Principle 2 of the Rio Declaration of 1992 embodying the obligation of States to ensure that activities within their jurisdiction of control do not cause damage to the environment of other States or of areas beyond natural jurisdiction, which, as confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons,*[6] was now part of the corpus of international law relating to the environment.

8. Prevention, the Special Rapporteur stated, was a preferred policy as compensation in case of harm could often not restore the *status quo ante*. The enhanced ability to trace the chain of causation, i.e. the physical link between the cause (activity) and the effect (harm), made it further imperative for operators of hazardous activities to take all necessary steps to prevent harm. The principle of

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[5] *Official Records of the General Assembly, Fifty-second session, Supplement No. 10* (A/52/10), para. 165.

[6] *I.C.J. Reports 1996,* p, 15, para. 29.

prevention had consequently been underscored in international jurisprudence and incorporated in numerous international instruments referred to in the report.

9. The Special Rapporteur recalled that, in the course of the Commission's consideration of the topic of international liability, reference had been made repeatedly to the duty of prevention as an obligation of conduct. Obligations of reparation were not considered as obviating the need for obligations of prevention. In fact, Professor Quentin-Baxter had dealt with the concepts of prevention and reparation as a continuum and as a compound obligation rather than as two mutually exclusive options and the Commission had endorsed his view that the topic of international liability lay within the field of "primary rules". Quentin-Baxter's primary contribution had been the presentation of a schematic outline, which, in relation to prevention, provided for the duty to provide information and to cooperate in good faith to reach an agreement, if necessary, upon the establishment of a non-binding fact-finding procedure. Moreover, it set out various factors which States could take into consideration in order to achieve mutual accommodation and balancing of interests. While there was strong support for this schematic outline in the Sixth Committee, some felt, however, that it should be reinforced to give better guarantees that the duties of prevention would be discharged. A few also expressed some skepticism as regards the viability of the topic.

10. Barboza had retained the basic approach developed by Quentin-Baxter. However, he had recommended a slight modification of the schematic outline in order to emphasize that failure to fulfil the obligations of prevention would entail certain adverse procedural consequences for the acting State. Barboza had also stressed the fact that, while States had an obligation to notify, consult and negotiate a mutually accepted regime governing activities involving a risk of transboundary harm, prior consent of the States likely to be affected by such activities was not required. He had identified the following six elements as regard the concept of prevention: prior authorization; risk assessment; information and notification; consultation; unilateral preventive measures; and a standard of due diligence

proportional to the degree of risk of transboundary harm in a particular case.

11. Turning to the draft articles provisionally adopted by the Commission in 1994 and the draft articles recommended by the Working Group in 1996, the Special Rapporteur noted that both had answered in the affirmative the controversial question whether prevention *ex post* - i.e. contingency measures to contain and minimize the effects of harm resulting from an accident - should be regarded as part of the duty of prevention. He further observed that draft articles 4 and 6 recommended by the Working Group provided the basic foundation for the concept of prevention, as they set forth the obligations to take all appropriate measures to prevent or minimize the risk of significant transboundary harm and to minimize its effects as well as to cooperate to that end.

12. Following an overview of the discussion that had taken place over the years on the *scope of the topic*, the Special Rapporteur highlighted the Working Group's conclusion that, at the current stage, the Commission could proceed without any specific identification of the activities falling within such scope, bearing in mind the types of activities listed in various conventions dealing with the issue of transboundary harm. His review of the debates both in the Commission and the Sixth Committee led the Special Rapporteur to the conclusion that draft articles 1 (a) regarding the activities within the scope of the draft articles and 2 on the use of terms proposed by the Working Group in 1996[7] could be endorsed by the Commission without any further amendment. He noted in this connection that harm to the global commons as such would be excluded from the scope of the topic. He recommended, however, the deletion of draft article 1 (b) proposed by the Working Group dealing with activities which did not involve a risk of causing significant transboundary harm but caused such harm none the less.

13. With respect to the *concept of prevention*, the Special Rapporteur had identified in his report a number of principles of both procedure and substance.

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[7] See footnote 3 above.

14. As regards *principles of procedure*, the Special Rapporteur observed that, in accordance with the principle of *prior authorization*, which had been embodied in draft article 9 recommended by the Working Group in 1996, authorization for an activity which included a risk of causing significant transboundary harm was granted subject to the fulfilment of certain conditions aimed at ensuring that such risk was properly assessed, managed and contained. In addition, States were required to put in place an appropriate monitoring machinery to ensure that the risk-bearing activity was conducted within the limits and conditions prescribed.

15. In assessing whether a particular activity had the potential of causing significant harm, States increasingly relied on an *environmental impact assessment* (EIA). Where such risk was identified, the State of origin had the obligation to notify States likely to be affected and to provide them with all available information, including the results of any EIA. The Special Rapporteur observed that certain criteria, such as location and size of an activity, the nature of its impact, public interest and environmental values, could be relied upon for developing a list of activities which should be subject to an EIA. Moreover, the use of substances listed in some conventions as dangerous or as hazardous could also provide an indication that an activity might cause significant transboundary harm and hence require an EIA. Be that as it may, the Special Rapporteur noted that an analysis of State practice with respect to EIA led to the conclusion that until now no uniform approach to transboundary information exchange has been followed.

16. Concerning the *principle of cooperation*, the Special Rapporteur observed that it was embodied in numerous international instruments. At the procedural level, cooperation included a *duty to notify* the potentially affected State, *to exchange information*, and to engage in *consultations*. The aim of such consultations was to reconcile conflicting interests and to arrive at mutually beneficial or satisfactory solutions. However, it was well-established that the obligation *to negotiate in good faith*, where it arose, did not imply an obligation to reach an agreement.

17. The Special Rapporteur suggested that the *principle of prevention or avoidance of disputes* was also one of the components of the concept of prevention. States were thus urged to develop methods, procedures and mechanisms promoting informed decision-making, mutual understanding and confidence-building. Resort to fact-finding commissions, good offices, mediation, and conciliation as well as to national reporting was particularly encouraged.

18. *The principle of non-discrimination,* within the context of prevention, consisted in making available to potential victims of transfrontier pollution residing outside the State of origin the same administrative or legal procedures open to residents of that State. The Special Rapporteur observed that problems could arise in the application of this principle when there were drastic differences between the substantive remedies provided in different States.

19. Regarding the second category of principles identified in the report, namely *principles of content,* the Special Rapporteur observed that, in accordance with the *principle of precaution,* lack of full scientific evidence did not justify the postponement of measures to prevent environmental degradation. He made the point that, while it was reflected in several international instruments, this principle had been not been interpreted in a uniform manner. In fact, it could be described as an evolving principle", the application of which depended on the particular circumstances of each case.

20. The *polluter-pays principle* was considered to be the most efficient means of allocating the costs of pollution prevention and control measures so as to encourage the rational use of scarce resources. The Special Rapporteur pointed out that it had been introduced in numerous international agreements as a guiding principle rather than a legal principle. Even where it had been included as a binding principle, it was couched in very general terms, which raised difficulties in its application.

21. The Special Rapporteur remarked that during the negotiations leading to the

adoption of the Rio Declaration, due consideration was given to the special situation and interests of developing countries. In this context, reference had been made to the *principles of equity, capacity-building and good-governance*. The Special Rapporteur pointed out that the principle of intra-generational equity recognized that economic development was a priority for developing countries and that environmental rules should not put an undue burden on such development. As for the principle of inter-generational equity, it provided that the environment and natural resources should be conserved and used for the benefit of both present and future generations. The Special Rapporteur further stated that a spirit of global partnership should prevail in order to enable developing countries and countries in transition to discharge the duties involved in prevention of transfrontier harm in their own self-interest as well as in the common interest. Such a global partnership could entail offering financial support through the development of common funds, facilitating the transfer of appropriate technology on fair and equitable terms and providing necessary training and technical assistance. In the view of the Special Rapporteur, many of the requirements for enhancing the capacity of States to meet their duties of prevention culminated in the need for the maintenance of good governance, which included the taking of necessary legislative, administrative or other action to implement such duty, as envisaged in draft article 7 recommended by the Working Group in 1996.

22. In *conclusion*, the Special Rapporteur emphasized again that the Commission had so far approached the obligation of prevention as an obligation of conduct. States had the obligation to identify activities likely to cause significant transboundary harm and notify States concerned accordingly, as well as to consult and negotiate. In the absence of agreement between the State of origin and the States likely to be affected, the former had to undertake unilateral measures of prevention. The standard of due diligence to be observed could vary from State to State, region to region, and from one point in time to another, which did not mean that there should exist double standards, but only that it was necessary to take into account the differing requirements of standards for activities generating different

levels of risk. Similarly, States could, by common agreement in a given region, adopt standards of due diligence commensurate with the prevailing levels of economic development and the availability of appropriate technology and financial means to discharge the duty of prevention.

23. The Special Rapporteur observed that, under the scheme developed so far, failure to perform a duty of prevention would not give rise to any legal consequences in the absence of harm. However, the Commission's decision to separate the issues of prevention and liability provided it with an opportunity to take a fresh look at the question of the legal consequences to be attached to the failure to comply with obligations of prevention. For this purpose, it would be necessary to distinguish between relevant duties of States and of operators of risk-bearing activities. As regards the former, failure to comply with the duty of prevention could be dealt with either at the level of State responsibility or as a matter of liability without attaching a taint of wrongfulness to or prohibiting the activity itself. The Commission had so far adopted the second approach. As for the consequences of the failure of operators, they should be addressed in national legislation.

24. The Special Rapporteur made the point that State practice as regards implementation of the procedural and substantive principles of prevention identified in his report was both evolving and flexible. He emphasized the importance of international cooperation in this respect, including the need to take into account the special circumstances and needs of developing countries.

25. He noted that the draft articles recommended by the Working Group in 1996 addressed many of the above principles of prevention. The Special Rapporteur therefore suggested that, once agreement was reached on the general orientation of the topic, the Commission review these draft articles and decide on their possible inclusion in the new draft to be elaborated on the question of prevention.

2. Summary of the Commission's debate

(a) General observations

26. The members of the Commission commended the Special Rapporteur for his report on such a complex topic.

27. It was observed that the work of the Commission on the issue of prevention pertained to progressive development rather than codification. It was emphasized again that obligations of prevention belonged to the realm of primary rules.

28. The Commission, it was said, had to respond to the pressing need of the international community for clear and concrete rules on prevention. It was pointed out in this respect that the fundamental obligation of prevention of environmental harm confirmed by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* was very general and required further elaboration. It was observed, on the other hand, that certain concepts, such as "due diligence" or "significant harm", were useful because of their flexibility and that an attempt to codify them might be counterproductive. The Commission was similarly cautioned not to elaborate rules on prevention which were below the standards which States were already required to respect under existing law. Attention was drawn in this connection to the self-contained regimes developed in certain areas, such as nuclear energy or non-navigational uses of watercourses.

29. There was widespread agreement with the Special Rapporteur's recommendation that the Commission should undertake a review of the articles adopted by the Working Group in 1996. In so doing, it should take into account a number of relevant international instruments, in particular the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.

30. There was also a view that the Commission's decision to focus on the issue of prevention was tantamount to a complete reorientation of the topic.

(b) Scope of the topic

31. There was broad support for the Special Rapporteur's recommendation that draft articles 1(a) and 2 proposed by the Working Group in 1996 be referred to the Drafting Committee.

32. A view was expressed that the Commission should not exclude from the scope of its work on prevention the question of harm to the global commons. The point was made, however, that this would prove difficult where no causal link to such harm could be established.

33. Some members expressed concern that too much emphasis was placed on the environmental protection aspect of the topic. But others pointed out that, even though it was not the primary goal of its activity, the Commission inevitably had to deal with the question of the environment, as transboundary damage could take at least three forms, namely: damage to persons, damage to property, and damage to the environment. It as also observed that it was difficult in practice to distinguish between various forms of damage, since environmental damage also involved damage to life, health and property. It was thus felt that the term "environment" should be defined in the context of this topic in a broader sense, as in the expression "environmental impact assessment", which encompassed questions such as prevention of loss of life.

34. Reservations were expressed with regard to the use of the term "prevention *ex post*", although it was recognized that the underlying concept was within the scope of the present topic.

(c) The concept of due diligence

35. The point was made that, although due diligence standards were more flexible than obligations of result and it was therefore reasonable to take into account factors such as the facilities available to the State concerned, that should not result in a system of double standards, or rather, in an absence of standards. It was also observed that, according to a recent resolution of the Institute of International Law,

due diligence should be measured by objective standards.[8] The view was expressed that it was difficult - and even dangerous - to attempt to define such standards in the abstract. It was recalled that the phrase "taking all appropriate measures" had been included in article 7 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses instead of "due diligence", proposed by the Commission.

(d) The concept of harm in the context of the present topic

36. The point was made that the concept of harm should be defined for the purposes of the topic of prevention.

37. Several members agreed with the Special Rapporteur that the Commission should recognize a threshold of tolerance for harm as a necessary condition for engaging States in a legal relationship. Reference was made in this regard to the debate both in the Commission and in the Working Group of the Sixth Committee on the law of the non-navigational uses of international watercourses, which had shown that the concept of "significant" harm was that which currently commanded the widest acceptance in the international community. The point was made that, while the determination of the level of harm depended on each particular case, there was also one objective standard, i.e. whether the damage was reparable. Other members felt that no threshold of harm should be established in relation to the duty of prevention. It was argued in this respect that environmental protection should take precedence over industrial development.

(e) Principles of prevention

38. The principles of procedure discussed in the report were considered generally acceptable, as was the principle of precaution. In fact, the question was raised whether they had not reached the status of customary law. While some felt that the polluter-pays principle should rather be considered in the context of the question of

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[8] Article 3 of the resolution on "Responsibility and Liability under International Law for Environmental Damage" adopted on 4 September 1997.

liability, others believed that, since a number of instruments envisaged that the potential polluter should bear the costs of prevention, it was justified to discuss the principle under the topic of prevention.

39. Some members expressed the view that it would unduly complicate the Commission's task to take into account the principles of equity, capacity-building and good governance identified in the report as they had highly political, social and economic aspects. But support was also expressed for their inclusion in the draft to be elaborated. It was further said that such principles had a role to play in the context of the effective implementation of the duty of prevention, even if they were not to be considered as an essential component of the concept of prevention as such. Another view was that the inclusion of said principles depended on the final form of the draft, as it was doubtful whether they would be acceptable in the framework of a binding instrument.

40. There was a view that the draft should expressly provide for a general obligation to cooperate, along the lines of article 8 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. It was also felt, however, that the principle of cooperation should not be interpreted too broadly, as this might impose an undue burden on the affected State; the latter should merely be required to act in good faith. The importance of the principle of good-neighbourliness was also underlined in this connection.

41. It was felt that the Commission should also address the question whether the State of origin adopting preventive measures ought to do so in accordance with its own standards or with those of the potentially affected State and that it should recommend to States a procedure for resolving this problem. It was pointed out, however, that the aim of the present exercise was to encourage States to agree on common standards rather than to rely on the standards of either the State of origin or the affected State.

(f) The legal consequences of non-compliance with the duty of prevention

42. Rejecting the notion that obligations of prevention should only be treated as obligations of conduct without any legal consequences in case of failure to comply, several members stressed that any such violation, whether or not harm had occurred, would entail State responsibility. This should be recognized, it was said, notwithstanding the fact that responsibility for violations of various procedural obligations of prevention, such as the obligation to notify, would not lead to drastic consequences.

43. The Special Rapporteur observed that the Commission would have to decide at an appropriate stage whether it would deal with the question of non-compliance with the duties of prevention in the context of the present topic or of its work on State responsibility.

44. It was agreed that the situation where damage occurred in spite of compliance with obligations of prevention was outside the scope of the present exercise, but views differed on whether the Commission should subsequently address the question of liability.

45. The point was made that the issue of the legal consequences of violations of the obligations under consideration led to the question of the status of the draft to be elaborated by the Commission. A declaration approved by the General Assembly was suggested as a possible option.

(g) Dispute settlement

46. The view was expressed that, where there was a risk of transboundary damage and the parties had not reached agreement as a result of consultations and negotiations, the draft articles should envisage compulsory resort to impartial fact-finding in the same manner as article 33 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses. Doubts were raised as to the advisability of the inclusion of dispute settlement provisions in the draft in light of the

controversy surrounding the subject in the context of the topic of State responsibility.

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Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER VI

INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

Corrigendum

Add the following paragraph after paragraph 5:

5 bis. On the basis of the Working Group's discussions, the Special Rapporteur proposed a revised text for the draft articles (A/CN.4/L.556). [1] The Commission decided at its 2542nd meeting, on 5 June 1998, to refer to the Drafting Committee the draft articles proposed by the Special Rapporteur, taking into account the comments made in the plenary.

[1] The proposal of the Special Rapporteur read as follows: [insert draft articles in L. 556].

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Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER V

UNILATERAL ACTS OF STATES

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GE.98-61980 (E)

A. Introduction

1. At its forty-ninth session, in 1997, the Commission decided to include in its agenda the topic "Unilateral acts of States". 1/ The General Assembly endorsed the Commission's decision in paragraph 8 of its resolution 52/156 of 15 December 1997. Also at its forty-ninth session, the Commission appointed Mr. V. Rodríguez Cedeño Special Rapporteur for the topic.

B. Consideration of the topic at the current session

2. At the current session, the Commission had before it the Special Rapporteur's first report on the topic. 2/ It considered that report at its 2524th to 2527th meetings held between 5 and 8 May 1998.

1. Introduction by the Special Rapporteur of his first report

3. The Special Rapporteur said that his first report was preliminary in nature, being in the manner of an introduction to the topic. It was his intention to submit a substantive report in time for the Commission's next session. The current report reflected much of the doctrine, jurisprudence and State practice, as well as the comments which Governments had made in the previous year in the Sixth Committee. It was, moreover, based on the conclusions of the working group which the Commission had established at its preceding session. 3/ The Special Rapporteur explained that his main objective in preparing the report had been to establish a systematic approach to the study of the topic, in keeping with the methodology which the working group had proposed.

4. The Special Rapporteur pointed out that the Permanent Court of International Justice and the International Court of Justice had on a number of occasions considered unilateral acts of States. Sometimes, those courts had come to the conclusion, as in the *Eastern Greenland* 4/ and

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1/ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), para. 221.

2/ Document A/CN.4/486.

3/ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 10* (A/52/10), paras. 195-216.

4/ *Legal Status of Eastern Greenland, P.C.I.J., Series A/B, No. 53*, p. 22 at pp. 36-37, 57-58 and 69-73.

Nuclear Tests 5/ cases, that the unilateral acts before them were binding under international law, regardless of whether or not they could be considered to fall within the purview of the law of treaties. Sometimes, on the other hand, they had concluded that the acts in question were political in nature and devoid of legal force, as in the *Frontier Dispute* 6/ and *Military and Paramilitary Activities* 7/ cases. There could be no doubt, though, in the light of this jurisprudence - and, likewise, of State practice and doctrine - that unilateral acts did exist as a phenomenon of international law.

5. The Special Rapporteur was of the opinion that it would not be possible to embark upon the elaboration of rules of international law governing unilateral acts of States unless a definition of those acts were first properly established - or at least the elements of a definition identified.

6. That being so, the principal objective of his first report had been to arrive at a definition of a strictly unilateral act, with a view to facilitating the future preparation of more detailed reports setting out rules relating to the performance, formal validity, effects, interpretation, invalidity, duration, amendment and termination of such acts.

7. Insofar as the elements of a definition were concerned, the Special Rapporteur explained that he considered it necessary first to identify those acts which fell outside the scope of the topic and which should therefore be excluded from study.

8. It was necessary next, he said, to set out criteria for determining the category of acts which should be the subject of study by the Commission. In the opinion of the Special Rapporteur, such acts were those unilateral acts of States which were "strictly" or "purely" unilateral in nature. He explained that he had used this terminology in his report in order to distinguish the

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5/ *Nuclear Tests (Australia* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 253 at paras. 34-51; and *Nuclear Tests (New Zealand* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 457 at paras. 35-53. Subsequent references to specific paragraphs of these Judgments are limited to the former of the two.

6/ *Frontier Dispute, Judgment, I.C.J. Reports 1986*, p. 554 at paras. 38-40.

7/ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14 at paras. 167-171 and 257-262.

acts which he proposed for study from those unilateral acts which were of a non-autonomous or dependent nature and which should be excluded from study as being already governed by existing rules of international law.

9. With regard to the first of these tasks, the Special Rapporteur drew attention to the fact that he had singled out certain categories of unilateral acts for exclusion from the study: namely, unilateral political acts, unilateral legal acts of international organizations and those attitudes, acts and conduct of States which, though voluntary, were not performed with the intention of producing specific effects in international law.

10. Turning first to political acts, the Special Rapporteur stated that it was his view that they should be excluded from the scope of the study which the Commission was undertaking. An act might be characterized as purely political, he suggested, if it gave rise solely to political effects and did not have any consequences at all in international law. It was, however, no easy matter to determine the nature of an act which was performed by a State. Indeed it was quite possible that an apparently political act, which had been performed outside the framework of international negotiations, entirely within a political context and without any of the formalities which were particular to an international legal act, might, nevertheless, be binding in international law upon the State that had performed it. Whether it was or not depended upon the intention of that State; and it would be for international courts and tribunals to determine what that intention had been. All this was clear from the Judgments of the International Court of Justice in the *Nuclear Tests* cases of 1974. 8/

11. The Special Rapporteur added that unilateral acts of a purely political nature were a quite common phenomenon and were frequently of considerable significance in the conduct of international relations. By means of such acts, States might enter into political commitments which regulated their conduct at the international level; even though breach of those commitments did not give rise to responsibility under international law and might not attract any legal sanction, the political responsibility of the State would be at issue and its credibility and participation in international affairs affected. Certainly, purely political commitments could not be considered on

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8/ Loc. cit. (*supra* note 5) at paras. 43, 44, 45, 48, 50 and 51.

a par with commitments of a legal nature, but they did share a common feature, insofar as both governed in a very real way the conduct of States in their international relations.

12. Insofar as the unilateral legal acts of international organizations were concerned, the Special Rapporteur suggested that they, too, should be considered as falling outside the bounds of the topic.

13. The Special Rapporteur noted that there was an ever-increasing body of practice relating to the acts of international organizations. Many of those acts took the form of resolutions, which could, in turn, be reduced to two basic types: recommendations and decisions. Those unilateral acts of the organization which took the form of decision-making resolutions, such as those relating to the operations of the organization or that were addressed to one of its subsidiary bodies, were legally binding. On the other hand, those which took the form of recommendations and were addressed to States were not binding in law. They were, nonetheless, often of great importance in the formation of rules of customary international law. Yet another category of the unilateral acts of international organizations - was made up of those acts which were formulated by the highest administrative authority of the organization. These included not only acts of an internal nature, but also acts relating to one or more States or to the international community as a whole. In the view of the Special Rapporteur, moreover, it would be difficult to elaborate rules which were common to the unilateral acts of States and of international organizations.

14. The Special Rapporteur trusted that it would be clear from the brief account which he had given that the subject of the unilateral acts of international organizations was complex and that it required special consideration.

15. The Special Rapporteur proposed that there also be excluded from study those unilateral acts of States which gave rise to international responsibility - a topic which the Commission was already considering on the basis of the reports of Mr. Crawford and Mr. Rao.

16. Turning to Chapter I of his report, the Special Rapporteur drew attention to the distinction which was there drawn between formal legal acts, on the one hand, and the legal rules that were created by means of those acts, on the other. It was his view that the Commission should focus on unilateral acts as formal legal acts: that is, as procedures or devices for the creation

of legal rules, in particular for the creation of legal obligations for the States which were their authors. The content of the legal rules so created should be considered incidental to the Commission's study, he suggested.

17. The Special Rapporteur drew attention to the review of the various substantive legal acts of States which was to be found in Chapter I of his report. That review had been made for the purpose of determining which acts fell within the sphere of the law of international agreements and which did not and so might be said to be in need of special rules to govern their operation.

18. Unilateral acts connected with the law of treaties, such as signature, ratification, the formulation of reservations and even the making of interpretative declarations, clearly fell within the treaty sphere, being governed by the rules of the law of treaties, in particular the rules laid down in the 1969 and 1986 Vienna Conventions.

19. The Special Rapporteur proposed that the following unilateral acts should be excluded from the scope of the study: acts which contributed to the formation of custom; study; acts which constituted the exercise of a power conferred by a treaty or by a specific rule of customary law (for example, the proclamation of a State establishing a maritime zone off its coast); acts which did not consist in the exercise of pre-existing legal powers, but which represented, the exercise of a freedom under international law (for example, the adoption of legislation making criminal certain activity which might be performed by foreigners abroad); and acts that created or gave rise to a treaty relationship (for example, offer and acceptance).

20. Turning to estoppel, the Special Rapporteur remarked that estoppel was a rule of evidence which had its origins in "common law" legal systems, but which had now found a place in the doctrine and jurisprudence of international law. However, while international courts had on a number of occasions considered the doctrine of estoppel, they had rarely relied upon it as a basis for their decisions. (For example, the *Corvaia* case of 1903 between Italy and Venezuela. 9/) The jurisprudence, moreover, had considered the doctrine of estoppel only in its restrictive form of estoppel by representation. That was

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9/ *Corvaia Case*, *Reports of International Arbitral Awards*, vol. 10, p. 609 at p. 633.

apparent from such decisions as those in the *Eastern Greenland*, 10/ *North Sea Continental Shelf*, 11/ *Temple of Preah Vihear*, 12/ *Nottebohm*, 13/ *Barcelona Traction* 14/ and *Arbitral Award of the King of Spain* 15/ cases.

21. The Special Rapporteur said that estoppel did not constitute a phenomenon which was of direct concern to the study of unilateral acts. An estoppel involved acts or conduct by one State which gave rise to certain expectations on the part of another State, on the basis of which that other State had proceeded to adopt a course of action which was to its own detriment. Although the conduct of the State which was responsible for the representation might appear, at first blush, to have some similarity to a unilateral legal act, it was, in fact, of a quite different character. The conduct which gave rise to an estoppel could involve either a positive act or a passive attitude, such as silence. There was, furthermore, no necessity that that conduct be performed with any intention to create legal effects. A true unilateral legal act, on the other hand, was a positive and formal legal act which was carried out precisely with the intention of giving rise to legal effects. Moreover, a unilateral legal act, such as a promise, placed the State which made it under a legal obligation immediately that that act was performed. In contrast, the most important element in an estoppel, was the conduct of the State to which the representation was made: that is, the conduct in which that other State engaged in reliance upon the representation which had been made to it by the first State. In the case of an estoppel,

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10/ Loc. cit. (*supra* note 4).

11/ *North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3 at paras. 27-33.

12/ *Case concerning the Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment of 15 June 1962, I.C.J. Reports 1962*, p. 6 at pp. 27-33, especially at p. 32.

13/ *Nottebohm Case (second phase), Judgment of 6 April 1955, I.C.J. Reports 1955*, p. 4 at pp. 17-20.

14/ *Barcelona Traction, Light and Power Company Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 6 at pp. 24-25.

15/ *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, Judgment of 18 November 1960, I.C.J. Reports 1960*, p. 192, especially at pp. 209 and 210-213. Note also ibid., p. 214.

then, the legal effect flowed not from the will of the State which made the representation, but from the reliance which was placed on that representation by the State to which it was made. The conduct of that other State was of fundamental importance. In the case of a unilateral legal act, on the other hand, such as a promise, the conduct of the beneficiary was, analytically speaking, not of any importance in determining its binding character, as the decisions of the International Court of Justice in the *Nuclear Tests* cases 16/ made clear. The Special Rapporteur added that some writers took the view that, in the *Barcelona Traction*, 17/ *Serbian Loans* 18/ and *North Sea Continental Shelf* 19/ cases, estoppel had been treated as a special means of establishing a treaty relationship. For that reason, too, it should, be excluded from the scope of the study which the Commission was undertaking.

22. The Special Rapporteur also proposed the exclusion from study of certain other forms of conduct which were not formal legal acts, but which were, nevertheless, capable of generating effects in international law. That was the case, for instance, with silence, where a State failed to protest a legal claim which had been made against it. The Special Rapporteur explained that the failure of a State to protest a claim or a situation did not necessarily connote any intention on its part to create legal effects, specifically, to render that claim or situation opposable to itself. Furthermore, silence was not a strictly or purely unilateral act for it could not, by itself and without more, have any legal effect or create any new legal relationship, since it necessarily presupposed for its effectiveness the performance of some prior act or conduct on the part of another State, to which it could be considered a response.

23. The Special Rapporteur stated that, in his view, similar considerations applied to notification. Regardless of whether or not it was a legal act,

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16/ Loc. cit. (*supra* note 5) at paras. 43 and 50.

17/ Loc. cit. (*supra* note 14).

18/ *Case concerning the Payment of Various Serbian Loans Issued in France, P.C.I.J., Series A, Nos. 20/21*, p. 5 at pp. 37-39.

19/ Loc. cit. (*supra* note 11).

notification was incapable of producing legal effects by itself. Rather, it presupposed for its effectiveness the performance of another act by some other subject of international law.

24. Turning to Chapter II of his report, the Special Rapporteur explained that it dealt with the criteria which he considered to determine the strictly unilateral nature of a legal act.

25. In his opinion, a strictly unilateral act was a single expression of the will of one or more States. Unilateral acts, then, could be either individual or collective in nature.

26. The Special Rapporteur pointed out that in his report he had described such acts as "heteronormative", since they produced legal effects in respect of subjects of international law which had not participated in their performance. That criterion, however, was insufficient, in his view, to distinguish those acts which were purely or strictly unilateral in character. For that purpose, he said, it was necessary to think in terms not only of the single attribution of the act, but also of its autonomy. In order to be classified as strictly unilateral, an act had to be self-sufficient in generating legal consequences: that is, it had to produce legal effects independently of any other manifestation of will, whether prior, simultaneous or subsequent, by some other subject of international law. If it were not so independent in generating legal effects, it would not be truly unilateral in character, but would fall into the treaty sphere.

27. The Special Rapporteur suggested that the autonomy of the obligation which was created by a unilateral act was a decisive criterion in establishing its strictly unilateral nature. Any legal act created rights and obligations; and a unilateral act naturally created an obligation for the State which performed it and a right in favour of one or more States which were strangers to its performance. However, in the case of strictly unilateral acts, the obligation arose not when that obligation was accepted, nor at the time that the State which was the beneficiary of that obligation subsequently engaged in any particular form of conduct. Rather, it arose when the State which performed the unilateral act intended that it arise. A State was able to assume an obligation in this way by exercising the power of auto-limitation which was conferred upon it by international law.

28. The Special Rapporteur pointed out that there were important practical consequences to the autonomy of the obligation which was created by means of a strictly unilateral act. When an international court or tribunal considered

whether an act was strictly unilateral, it would examine the formulation of that act and not the conduct of the State in respect in which it was performed and which it vested with legal rights. The same would be true when a court or tribunal turned to determining the precise legal effects of a strictly unilateral act. 20/

29. The Special Rapporteur pointed out that Chapter II also considered the legal basis of the binding nature of unilateral acts of States. Under the law of treaties, every treaty had to be performed in good faith. Given the need for mutual trust, confidence and security in international relations and for international legal certainty, good faith also had to be regarded, in his view, as fundamental to the binding nature of unilateral acts of States. 21/

30. The Special Rapporteur suggested that the binding nature of strictly unilateral acts might also be explained by reference to the power of auto-limitation which States enjoyed under international law: in other words, their ability in the exercise of their sovereignty to subject themselves to international legal obligations. Such obligations need not necessarily be subject to the principle of reciprocity and so might be entirely unilateral in form and autonomous in nature. Accordingly, the binding nature of a unilateral legal act of a State might be said to be based on the intention of the State that performed it, and not on any legal interest which some other State might have in the performance of the obligations which it purported to create.

31. The Special Rapporteur went on to recall that the principle *pacta sunt servanda* was the basis of the binding nature of treaties, as was apparent from article 26 of the Vienna Convention on the Law of Treaties of 1969. He suggested that a parallel principle, such as *promissio est servanda*, could be said to found the binding character of unilateral acts of promise. Appeal might also be made to broader principles, such as *acta sunt servanda* or, for unilateral declarations, *declaratio est servanda*.

32. On the basis of the preceding considerations, the Special Rapporteur placed before the Commission in paragraph 170 of his report the component

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20/ See the *Nuclear Tests* cases loc. cit. (*supra* note 5) at paras. 44, 45, 50 and 51.

21/ See the *Nuclear Tests* cases, loc. cit. (*supra* note 5) at para. 46. Note also ibid., para. 51.

parts of a definition of a unilateral act for the purposes of the study on which the Commission was embarked. As was there stated, a strictly unilateral declaration could be regarded as an autonomous expression of clear and unambiguous will, explicitly and publicly issued by a State, for the purpose of creating a juridical relationship - in particular, of creating international legal obligations - between itself and one or more States which did not participate in its elaboration, without it being necessary for those States to accept it or subsequently to behave in such a way as to signify such acceptance.

33. The Special Rapporteur pointed out that this definition was limited to unilateral declarations and that unilateral acts which did not take that form were excluded from its scope. In explanation of this limitation, the Special Rapporteur stated that it was his view that the unilateral declaration was the basic instrument which States employed in order to accomplish the transactions which they chose to effect by means of unilateral acts. In other words, the unilateral declaration was to the law of unilateral acts what the treaty was to international treaty law. That being so, any final document which the Commission might adopt on the topic of unilateral acts of States should, in his opinion, be limited to those unilateral acts which were also unilateral declarations.

34. In conclusion, the Special Rapporteur remarked that it was clear that unilateral acts of States did exist in international law. Moreover, it was clear that certain such acts were truly autonomous, in the sense that they were strictly unilateral in nature, their effectiveness in law not being conditional upon the occurrence of any other manifestation of will. The consideration of such acts by the Commission was both of practical interest and of considerable political relevance, since States were increasingly resorting to their performance in the conduct of their international relations.

35. If it was considered possible and advisable to undertake the elaboration of rules governing the functioning of unilateral declarations, the Special Rapporteur suggested that the Commission reconstitute the working group which had been established at its previous session in order to consider the scope and content of the work that lay ahead.

2. Summary of the debate

36. The members of the Commission commended the Special Rapporteur on his report. It was said that the topic was an important one. It was also one of the most difficult topics that the Commission had addressed to date.

(a) General observations

37. During the course of the debate, certain members voiced doubts as to whether it was possible in international law for a unilateral act of a State by itself to effect an alteration in the legal relations between that State and some other State which had not participated in its elaboration. Either the agreement of that other State was necessary, it was said, or at least the performance by it of some kind of act in response to, or in reliance on, the unilateral act concerned.

38. Other members, however, pointed out that the doctrine of unilateral acts had solid foundations in the doctrine of international law, in the jurisprudence of the International Court of Justice and in the practice of States. It was also observed that the General Assembly had presupposed the existence of such a doctrine when, in its resolution 52/156 of 15 December 1997, it had endorsed the decision which the Commission had taken at its previous session to study the subject. Certain members observed in this connection that States sometimes had doubts as to the binding character of specific unilateral acts which had been performed in their favour by other States. It was also remarked that States preferred to have transactions which were effected in their favour by means of unilateral acts reduced into treaty form, if at all possible. Nevertheless, they certainly recognized and accepted that unilateral acts were capable, by themselves, of giving rise to legal effects under international law.

39. Insofar as concerned the relationship of unilateral acts to the sources of international law enumerated in Article 38 of the Statute of the International Court of Justice, one member was of the opinion that, although no explicit reference to unilateral acts appeared in that provision, they were, nonetheless, included by implication within the scope of Paragraph 1 (*b*). Other members, however, considered that that paragraph did not contain any reference, even implicit, to unilateral acts. At the same time, certain members observed that Article 38 (1) of the Court's Statute was not an exhaustive list of the sources of international law and that, notwithstanding their omission, unilateral acts definitely constituted one of

those sources. Certain other members, on the other hand, agreed with the Special Rapporteur that unilateral acts represented a source not of international law, but of international obligations. One member, however, said that a distinction between sources of international law and sources of international obligations was illusory; while another remarked that the question whether unilateral acts constituted a source of international law required further consideration.

40. With respect to the basis of the binding nature of unilateral acts under international law, several members expressed the view that it was to be found in the principle of good faith, as well as in the desirability of promoting conditions of security, confidence and trust in international relations. Reference was made in support of this view to the Judgments of the International Court of Justice in the *Nuclear Tests* cases of 1974. 22/ It was accordingly said not to be necessary to have recourse to the elaboration of a principle which was proper to unilateral acts, such as *acta sunt servanda*, *promissio est servanda* or *declaratio est servanda*. While agreeing with this conclusion, one member stated that the source of the binding nature of unilateral acts resided, rather, in the sovereignty of States.

(b) Scope of the topic

41. While a number of members stated that it was necessary to identify or to establish limits for the topic, it was, at the same time, remarked that these limits should not be overly narrow or restrictive. Conversely, it was pointed out that there was no necessity that the Commission undertake the examination of every type of act which might fall within the scope of the topic and that the Commission might quite properly decide to select just some of them for study.

42. As far as the limits suggested by the Special Rapporteur were concerned, several members were of the view that, in proposing that the Commission confine its study to strictly or purely unilateral acts, he had, generally speaking, set boundaries for the topic which were too narrow.

43. Turning to the Special Rapporteur's suggestions as to the particular categories of acts which should be excluded from the scope of the topic, although there was general agreement that unilateral acts of international

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22/ Loc. cit. (*supra* note 5).

organizations fell outside its ambit, certain members considered that reference might usefully be made to such acts in order to assist in the analysis of the unilateral acts of States. It was pointed out, though, that such reference should be limited to the external acts of international organizations and not extend to their internal acts.

44. There was general agreement with the Special Rapporteur's suggestion that unilateral acts of States which were possessed solely of political consequences fell outside the boundaries of the topic.

45. With regard to the distinction between unilateral "legal" acts and unilateral "political" acts, it was generally acknowledged that it was often difficult to determine into which category a particular act fell. According to one point of view, the answer turned upon the intention of the State performing the act. However, it was also said that, while the expressed or evident intention of the author of the act was certainly determinative, it was, at the same time, entirely possible that a unilateral act, including a promise, might be legally binding or productive of legal consequences in the absence of any clear evidence that it had been the intention of the author State that it be so.

46. There was general agreement with the Special Rapporteur's view that, insofar as a unilateral act of a State might be contrary to its obligations under international law and give rise to international responsibility, it should not be the subject of study by the Commission in the context of the present topic. There was also general agreement with his view that unilateral acts which came within the ambit of the law of treaties - such as signature, ratification, denunciation and the formulation of a reservation - lay beyond the topic's bounds. Insofar as a unilateral act contributed to the formation of a rule of customary international law, there was, once more, agreement that it did not come within the bounds of the topic. A similar view was expressed with regard to unilateral acts which constituted the exercise of a competence conferred by a particular rule of customary law or by a treaty, such as an act of a State establishing a maritime zone. (Mention was also made in this regard of declarations accepting the compulsory jurisdiction of the International Court of Justice pursuant to Article 36 (2) of the Court's Statute.) There was agreement, too, that unilateral acts which were solely

internal in nature and effect, including those which were adopted in implementation of the international obligations of a State, were beyond the bounds of the topic.

47. However, differing views were expressed as to whether the Commission should study the silence of a State inasmuch as that silence might bring about an alteration of the position of the State under international law or cause some legal situation to become opposable to it. While some members agreed with the Special Rapporteur's view that this topic be excluded, other members of the Commission were of the opinion that it should undertake the study of silence and acquiescence. Insofar as they were generative of legal effects under international law, these were important phenomena which, if only for practical reasons, it would be difficult to exclude from study. Alternatively, it was said that, while it was not a legal act in the strict and formal sense of those words, silence could be considered a unilateral act, to an extent at least, since it could be viewed as an expression of intention on the part of the State concerned to assume legal obligations or to accept a juridical situation with which it was faced. One member emphasised in this connection that the Commission should study not only those cases of silence which involved inaction on the part of a State which was confronted with a claim or situation, but also those in which that State engaged in conduct from which its acceptance of that claim or situation could be implied.

48. A broadly similar range of opinions was expressed with regard to estoppel.

49. On the one hand, agreement was expressed with the view of the Special Rapporteur that estoppel should not be the subject of study by the Commission. By way of explanation, it was said that, for there to be an estoppel, it was necessary that one State perform an act or engage in certain conduct and that another State perform an act or engage in certain conduct in response. The first act or conduct could not, by itself and without the second, give rise to any legal consequences. That being so, estoppel ought not to be the subject of study within the framework of the current topic. It was also said that an estoppel did not necessarily require the performance of an act which was intended to generate legal effects and, on that account also, should not be the object of study by the Commission.

50. On the other hand, it was said that there was a developed body of jurisprudence on the subject of estoppel, that the doctrine was of

considerable importance in the practice of international law and that it should accordingly, if only for practical reasons, be included within the scope of the study which the Commission was undertaking. Even if the focus of the study were limited to autonomous unilateral acts - that is, to acts which were self-sufficient in generating legal consequences - an exception might be made in respect of estoppel for these reasons. Moreover, it was said that examination of the doctrine of estoppel might be useful to the Commission in gaining a fuller view of those forms of unilateral act which did undoubtedly fall within the parameters of the topic.

51. Insofar as concerned unilateral statements which were made by the Agent of a State in the course of proceedings before an international court or tribunal, certain members voiced disagreement with the view of the Special Rapporteur and suggested that such statements be studied by the Commission. It was pointed out in this regard that certain of the judicial decisions and arbitral awards which were frequently cited in the literature of unilateral acts related to acts of this very type.

52. One member expressed the view, contrary to that of the Special Rapporteur, that acts of notification should be included within the scope of the study.

53. A view was also expressed favouring the study of those unilateral acts which might serve as evidence of the attitude of a State regarding some other act or some fact or situation.

54. Turning to the acts which the Special Rapporteur enumerated in his report as falling within the scope of the topic, there was general agreement that the study encompass unilateral acts of promise, recognition, renunciation and protest. One member was also of the view that the Commission should undertake the study of acts of waiver.

(c) Definition and elements of unilateral acts

55. With regard to the Special Rapporteur's suggestion that the Commission should first attempt to draft a definition of a unilateral act, a range of views was expressed.

56. On the one hand, it was said that such an exercise was crucial in order to establish the boundaries of the topic and determine the proper range of the Commission's work. At the same time, it was remarked that any definition which might be drawn up should not be taken too strictly, nor should it be understood to fix the parameters for the topic in a rigid or inflexible way.

Rather, it should be used to help orientate the Commission's work and establish its focus. Certain members stated in this connection that the definition which was proposed by the Special Rapporteur in paragraph 170 of his report could be used by the Commission as a starting-point for its work.

57. On the other hand, doubts were expressed as to the wisdom, and even the feasibility, of attempting a definition of a "unilateral act". Unilateral acts of States were so diverse in their nature that it was difficult to identify any consistency to the subject, it was said. It was accordingly to be doubted whether the topic was a unified subject which would admit of a single, all-embracing definition of the acts which it might be understood to embrace. Rather, the topic should be conceived as compartmentalized in nature and as comprising various types or categories of unilateral acts which varied one from another in terms of their properties and characteristics. Any definition which tried to transcend these categories would have to be set at too high a level of abstraction for it to be of any use. Alternatively, it was inevitable that any definition would be incomplete and that it would omit certain unilateral acts from its scope. According to this, latter, point of view, it would be better simply to identify certain categories of acts which it was agreed should be the subject of study and to proceed directly to the consideration of the rules which were proper to each of them.

58. Turning to the elements of the definition of a unilateral act which were proposed by the Special Rapporteur, certain members concurred with his suggestion that the Commission should focus on unilateral declarations. While acknowledging that declarations constituted the core of the topic, certain other members considered that the Commission should be prepared also to consider other, less formal ways in which a State might bind itself unilaterally. (Specific mention was made in this connection of silence and acquiescence and of estoppel.) Other members disagreed with this approach, pointing out that the topic which the General Assembly had requested the Commission to study was "unilateral acts of States" and not "unilateral declarations". That being so, the Commission should examine those unilateral acts of a State which did not involve the making of a declaration, just as much as it should study unilateral declarations. It should also examine unilateral acts which constituted a course of conduct. It was noted in this connection that acts of a State which were not couched in the form of a

declaration might give rise to effects which were identical with those arising from a declaration, for example, acts constituting implicit recognition.

59. Several members of the Commission agreed with the Special Rapporteur's suggestion that a unilateral act should involve a clear expression of the will or intention on the part of its author to create legal effects or to alter its juridical situation under international law. Others disagreed, arguing that while it might be necessary in the case of certain types of unilateral acts that there be an intention on the part of their authors that they produce legal effects, this was not so in respect of others. Indeed, the jurisprudence suggests that States could perform a unilateral act without realising it. An international tribunal might, for example, find that a unilateral declaration which contained a promise was binding upon its author under international law even though that State might maintain that it had had no intention to assume any such obligation when it performed that act.

60. Reflecting this divergence of views, differing views were also expressed regarding the usefulness of the concept of legal act which was proposed by the Special Rapporteur.

61. With regard to the element of publicity which the Special Rapporteur had suggested was a defining feature of a unilateral act, the view was expressed that, while this factor had been stressed in some of the jurisprudence, at least one judicial decision indicated that it was not a precondition to the legal effectiveness of a unilateral act and that a unilateral promise, for example, could legally commit the State that made it notwithstanding that it was given behind closed doors. The publicity of a unilateral act was relevant to proof of its existence and of the intention with which it was performed, as well as to the identification of its beneficiaries, it was said. On the other hand, the view was expressed that, in order to effect an alteration in the juridical situation of the State that performed it vis-à-vis another State, a unilateral act had to be made known to that other State. This, it was said, was what was connoted by the suggested element of publicity.

62. Insofar as concerned the Special Rapporteur's suggestion that the scope of the study should be limited to autonomous unilateral acts - that is, to those unilateral acts which were capable by themselves of producing legal effects under international law and which did not depend for this purpose either upon the performance of another act by some other State or else upon its failure to act - different views were expressed.

63. Several members of the Commission were of the view that the Commission should indeed limit its work to unilateral acts of this type.

64. Certain members observed that, notwithstanding their ability themselves, without more, to alter the juridical relations of those States that performed them, such acts might provoke reactions on the part of other States. These reactions should not be ignored when it came to determining the legal effects which might be attributed to the acts concerned, it was said. This was all the more so inasmuch as these reactions might even affect the classification of the acts concerned as unilateral. To this extent, it was said that the Commission could not avoid considering the phenomenon of offer and acceptance. It was said that unilateral acts were frequently, if not generally, performed within the context of international negotiations. In fact, it was rare to encounter a unilateral act which had not been solicited by some other State, or which had not been made in response to some statement or conduct on the part of another State. The view was expressed that this background in international negotiations was significant for the proper analysis of unilateral acts.

65. It was also said that it was not self-evident that the self-sufficiency of an act in generating legal consequences should be a crucial factor in determining whether or not it should be the subject of study within the context of the current topic. There were certain types of act which were not autonomous in the sense in which that word had been used by the Special Rapporteur, but which were, nonetheless, generally considered by practitioners to belong to the sphere of unilateral acts and whose study, in view of their practical and theoretical importance, there was good reason for the Commission to undertake.

66. Other members of the Commission were of the view that, while autonomous unilateral acts should be the main focus of the study, the Commission should, at the same time, be prepared to go beyond such acts and to undertake the examination of at least certain of those unilateral acts which were not capable by themselves and without more of producing legal effects. Particular mention was made in this regard of estoppel and of silence and acquiescence.

(d) Approach to the topic

67. Several members expressed agreement with the suggestion of the Special Rapporteur that the Commission should focus its attention upon the unilateral act as a "formal" act - that is, upon the unilateral act as an

instrument or procedure for bringing about legal consequences (*instrumentum*) - rather than upon the "substantive" act - that is, upon the legal transaction or operation which a unilateral act might be used to effect (*negotium*). Other members, were of the view that it was not possible to make a distinction between the formal act and the substantive act in the manner proposed by the Special Rapporteur. The act and the legal transaction which it effected were indissociable, the former having no legal meaning independently of the latter.

68. On one view, the differences which might exist between the different types of transaction which could be effected by means of a unilateral act were not such as to prevent the elaboration of a single law of unilateral acts, just as the differences which existed between international agreements had not prevented the codification of a single law of treaties. According to this view, the Commission should confine itself to identifying and setting out rules which were applicable to unilateral acts in general, whatever the transaction might be that they might effect.

69. Several members, were of the opinion that the approach which was suggested by the Special Rapporteur was not well founded, inasmuch as it assumed that the topic of unilateral acts was unitary in nature and that it was possible to subject unilateral acts to a single body of rules regardless of the type of transaction which they were used to effect. The same question - for example, the circumstances, if any, in which an act was capable of revocation - had a different practical meaning or significance depending upon the particular category of act which was the subject of consideration - a promise, for example, or an act of recognition or a protest. It therefore hardly admitted of the same answer in each case. According to this point of view, the Commission should not attempt to deal with the topic as a single whole, nor to elaborate rules which were meant to apply to all those forms of unilateral act which fell within its scope. This would only lead inevitably to the articulation of rules which were pitched at too high a level of abstraction to be useful. Rather, the Commission should proceed to a staged consideration, one by one, of the categories or types of unilateral act which it might decide to address and to the identification of the rules and the elucidation of the issues which were proper to each. Alternatively, it was said that, while it might be possible to identify certain rules which were

common to all unilateral acts, there were also rules which were particular to each category of unilateral act and these, too, should be the subject of study by the Commission.

70. Certain members expressed doubts as to whether any of these approaches to the topic was feasible. As they saw it, there were certain domains of international law in which the rules relating to unilateral acts were well established. An attempt might certainly be made to extrapolate from the law in these domains and to set out rules which were applicable to unilateral acts in general. However, it was to be doubted whether this would prove possible. Instead, it was probably the case that, as one moved from one substantive branch of international law to another, the rules which regulated the conditions and effects even of those unilateral acts which effected the same kind of transaction varied and changed. The most that the Commission could do, then, was to undertake the elaboration of rules on unilateral acts in particular substantive fields of international law, such as the law of armed conflict, the law of nuclear energy, the law of the environment and so on.

71. Insofar as concerned the materials on which the Commission should rely in elaborating the law of unilateral acts, one member remarked that the law in the field was largely based on a handful of judicial decisions, which were, moreover, quite confusing in the picture that they presented. The Commission would have to subject these cases to careful analysis in order to make sense of the law, he said. While acknowledging that analysis of the jurisprudence would indeed be necessary, several members remarked that the law of unilateral acts was based not just on case law, but also on a considerable body of State practice, which also predated the modern and more well known decisions in the field. This, too, would need to be examined. Furthermore, while the manner in which the law had been applied to the facts in some of those modern decisions had been criticized, those decisions formed part of the jurisprudence regarding unilateral acts and States now relied upon the law as it was there set forth. It would not be right, then, to cast doubt upon the value of those decisions as precedents. Mention was also made by several members of the rules of the law of treaties, which, it was said, should prove of considerable use in elaborating rules on analogous issues in the law of unilateral acts.

72. In this connection, the suggestion was made that the Secretariat might make available to the Commission at its next session a compilation of relevant

excerpts from all of those decisions of the International Court of Justice which were relevant to the study of the topic. It was also suggested that members of the Commission might provide the Special Rapporteur with pertinent examples drawn from the national practice of their State of origin.

73. Notwithstanding the existence of these various sources, it was observed by certain members that there did not yet exist any coherent theory of unilateral acts and that the work of the Commission would accordingly partake more of the nature of progressive development than of straightforward codification.

74. Several members made references to the particular questions or issues which the Commission should address in elaborating the law of unilateral acts of States. Specific mention was made of the rules governing the imputation of unilateral acts to States, the conditions which needed to be fulfilled in order for a unilateral act of a State to exist, including any requirements of form which there might be, the rules governing the interpretation of unilateral acts, the effects of unilateral acts, including rules determining the identification of the State or States whose legal relations with the author State were altered or affected by the act, the rules regulating the validity of unilateral acts and the circumstances and manner in which they might be modified, terminated or revoked. Mention was also made, in respect of silence and estoppel, of the definition of the circumstances which a State needed to create, for the silence or representation of another State to give rise to legal effects; and, with regard to protest, it was said that the Commission would need to clarify the circumstances in which it was helpful for a State to make a protest.

75. A number of members made observations regarding the problem of the revocation of unilateral promises. Some remarked that the ability of a State to revoke a unilateral promise which it had made should depend, at least in part, upon its intention when it performed that act. Thus, if it had intended that its promise be revocable, then it should be susceptible of revocation, subject to whatever conditions or restrictions that State might have imposed upon itself in that regard. Reference was made in support of this conclusion to the decision of the International Court of Justice in the jurisdictional phase of the case concerning *Military and Paramilitary Activities in and*

against Nicaragua. 23/ Conversely, it was said, if the State which had made the promise had intended that it be irrevocable, then it should not, in principle, be subject to revocation. With regard to those cases in which it was not possible to identify any intention on the part of the declarant State, one member expressed the view that, since the legal relations created by a unilateral promise were not reciprocal in nature, such a promise should be presumed to be revocable at will by the State which had made it.

76. Several members, however, were opposed to this conclusion, remarking that, were this so, the binding nature of such acts under international law would be quite illusory and the expectations of those States in whose favour they were made would lack protection. On the other hand, it was observed that, were unilateral promises to be presumed to be of indefinite duration and not to be susceptible of revocation without the consent of the State or States in whose favour they were made, then States would be reluctant ever to make such promises. Alternatively, they would find themselves compelled in certain circumstances to resile from them. Accordingly, there should be some, albeit not unlimited, ability on the part of a State which made such a promise to revoke it.

77. The suggestion was made in this connection that guidance on the subject might be sought in the general rules of the law of treaties. The International Court in the jurisdictional phase of the *Nicaragua* case 24/ had used analogies drawn from that field in order to analyse the question of the withdrawal and modification of unilateral declarations which had been made under Article 36 (2) of the Court's Statute. In the same vein, it was suggested that reference should be made to the rules set out in articles 34 to 37 of the Vienna Convention on the Law of Treaties of 1969, in particular to article 37 (2).

(e) Final form of the Commission's work

78. Several members agreed with the Special Rapporteur that it was premature to decide what form should be given to the Commission's work on the topic. At the same time, a number of opinions were voiced on the matter, it being

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23/ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 418.

24/ Loc. cit (preceding note).

remarked that the issue should not be postponed, since the form which was chosen would influence the way in which the Commission carried out its work.

79. On the one hand, several members said that the Commission's work should probably, or at least might conceivably, take the form of draft articles with commentaries. It was said that such a form of output would be helpful in generating greater stability and security in international relations. Other members, however, considered that it would be difficult to codify the law on the topic in such a way and that to attempt to do so might lead the Commission into problems and even prove unhelpful to States. In particular, such a form of output could well restrict diplomats' freedom of manoeuvre and reduce the flexibility of what was an important device in the conduct of international relations whose most useful characteristic was its lack of formality. Certain of those who expressed this view did not exclude the possibility that the Commission might ultimately produce draft articles on the topic, but considered that it should not embark on such an enterprise as yet and that, initially at least, it should confine itself to studying the topic in greater detail or else should aim at some other form of output.

80. On the other hand, it was said by a number of members that the Commission's work, either initially or finally, should take the form of an expository study. Other members, however, remarked that the mission of the Commission was not a doctrinal one.

81. Yet another view was that the Commission's work might take the form of guidelines.

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INTERNATIONAL LIABILITY FOR INJURIOUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY DAMAGE FROM HAZARDOUS ACTIVITIES)

Proposal by the Special Rapporteur

1. At its 2531st meeting, on 15 May 1998, the Commission decided to convene a Working Group to assist the Special Rapporteur in his review of draft articles 3 to 22 adopted by the Working Group in 1996,[1] taking into account the Commission's decision to proceed with its work on the topic "International liability for injurious consequences arising out of acts not prohibited by international law" dealing first with the issue of prevention under the subtitle "Prevention of transboundary damage from hazardous activities".[2] The purpose of such review, inter alia, was to ascertain whether the draft articles require any adjustment, addition or amendment in the light of the scope of the topic and the various principles and procedures that the duty of prevention entails.

[1] Official Records of the General Assembly, Fifty-first session, Supplement No. 10 (A/51/10), annex I.

[2] Ibid., Fifty-second session, Supplement No. 10 (A/52/10), para. 168.

2. As a result of the discussion in the Working Group, the Special Rapporteur submits to the Commission the following proposal:

[Article 3]

[Freedom of action and the limits thereto]

[deleted]

Article 3[4]*

Prevention

States shall take all appropriate measures to prevent, and minimize the risk of, significant transboundary harm.

Article 5

Liability

[deleted]

Article 4[6]

Cooperation

States concerned shall cooperate in good faith and as necessary seek the assistance of any international organization in preventing, and minimizing the risk of, significant transboundary harm.

Article 5[7]

Implementation

States shall take the necessary legislative, administrative or other action to implement the provisions of the present articles.

Article 6[8]

Relationship to other rules of international law

Obligations arising from the present articles are without prejudice to any other obligations incurred by States under relevant treaties or principles of international law. 3/

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* The number within square brackets indicates the number of the corresponding article proposed by the Working Group in 1996.

3/ Consideration of this article should be suspended until a decision is taken on the form of the draft articles.

Article 7[9]

Prior authorization

1. The prior authorization of a State is required for activities within the scope of the present articles carried out in its territory or otherwise under its jurisdiction or control. Such authorization shall also be required in case a major change is planned which may transform an activity into one falling within the scope of the present articles.

2. The requirement of prior authorization established by a State under paragraph 1 shall be made applicable in respect of all pre-existing activities within the scope of the present articles.[4]

Article 8[10]

Impact assessment

1. Any decision in respect of the authorization of an activity within the scope of the present articles shall be based on an evaluation of the possible adverse impact of that activity on persons, property as well as on the environment of other States.

2. States shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.[5]

Article 11 [6]

Pre-existing activities

Article 12

Non-transference of risk

[deleted]

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[4] Paragraph 2 reflects the content of deleted article 11 (Pre-existing activities).

[5] Paragraph 2 reflects the content of deleted article 15 (Information to the public).

[6] The content of article 11 is reflected in article 7[9], paragraph 2.

Article 9[13]

Notification and information

1. If the assessment referred to in article 8[10] indicates a risk of causing significant transboundary harm, the State of origin shall, pending any decision on the authorization of the activity, provide the States likely to be affected with timely notification thereof and shall transmit to them the available technical and other relevant information on which the assessment is based.

2. The response from the States likely to be affected shall be provided within a reasonable time.

Article 10[17]

Consultations on preventive measures

1. The States concerned shall enter into consultations, at the request of any of them, with a view to achieving acceptable solutions regarding measures to be adopted in order to prevent, and minimize the risk of, causing significant transboundary harm.

2. States shall seek solutions based on an equitable balance of interests in the light of article 11[19].

3. If the consultations referred to in paragraph 1 fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of States likely to be affected in case it decides to authorize the activity to be pursued at its own risk, without prejudice to the rights of any State likely to be affected.

Article 11[19]

Factors involved in an equitable balance of interests

In order to achieve an equitable balance of interests as referred to in paragraph 2 of article 10[17], the States concerned shall take into account all relevant factors and circumstances, including:

(a) the degree of risk of significant transboundary harm and the availability of means of preventing such harm and minimizing the risk thereof or of repairing the harm;

(b) the importance of the activity, taking into account its overall advantages of a social, economic and technical character for the State of origin in relation to the potential harm for the States likely to be affected;

(c) the risk of significant harm to the environment and the availability of means of preventing such harm and minimizing the risk thereof or restoring the environment;

(d) the economic viability of the activity in relation to the costs of prevention demanded by the States likely to be affected and to the possibility of carrying out the activity elsewhere or by other means or replacing it with an alternative activity;

(e) the degree to which the States likely to be affected are prepared to contribute to the costs of prevention;

(f) the standards of protection which the States likely to be affected apply to the same or comparable activities and the standards applied in comparable regional or international practice.

Article 12[18]

Procedures in the absence of notification

1. If a State has reasonable grounds to believe that an activity planned or carried out in the territory or otherwise under the jurisdiction or control of another State may have a risk of causing significant transboundary harm, the former State may request the latter to apply the provision of article 9[13]. The request shall be accompanied by a documented explanation setting forth its grounds.

2. In the event that the State of origin nevertheless finds that it is not under an obligation to provide a notification under article 9[13], it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations in the manner indicated in article 10[17].

3. During the course of the consultations, the State of origin shall, if so requested by the other State, arrange to suspend the activity in question for a period of six months unless otherwise agreed.

Article 13[14]

Exchange of information

While the activity is being carried out, the States concerned shall exchange in a timely manner all information relevant to preventing, and minimizing the risk of causing, significant transboundary harm.

Article 15 [1]

Information to the public

Article 14[16]

National security and industrial secrets

Data and information vital to the national security of the State of origin or to the protection of industrial secrets may be withheld, but the State of origin shall cooperate in good faith with the other States concerned in providing as much information as can be provided under the circumstances.

Article 15[20]

Non-discrimination

Unless the States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who may be or are exposed to the risk of significant transboundary harm as a result of activities within the scope of the present articles, a State shall not discriminate on the basis of nationality or residence or place where the injury might occur, in granting to such persons, in accordance with its legal system, access to judicial or other procedures to seek protection or other appropriate redress.

Article 21

Nature and extent of compensation or other relief

[deleted]

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[1] The content of article 15 is reflected in article 8[10], paragraph 2.

Article 22

Factors for negotiations

[deleted]

Article 16

Settlement of disputes

Any difference or dispute concerning the interpretation or application of the present articles shall be settled expeditiously by mutual agreement through such peaceful means of settlement chosen by the parties, inter alia, submission of the dispute to arbitration or judicial settlement. Failing an agreement in this regard within a period of six months, the parties concerned shall, at the request of any of them, have recourse to the appointment of an independent and impartial fact-finding commission. The report of the commission shall be recommendatory in nature and shall be considered by the parties in good faith.

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NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

Report of the Working Group

I. INTRODUCTION

1. At its 2530th meeting, on 14 May 1998, the International Law Commission established a Working Group on the topic "Nationality in relation to the succession of States" under the chairmanship of Mr. Václav Mikulka, Special Rapporteur, 1/ to consider the question of the possible orientation to be given to the second part of the topic dealing with the question of the nationality of legal persons in order to facilitate the Commission's decision on this issue.

2. The Working Group held two meetings, on 14 May and 2 June 1998. It agreed on a number of preliminary conclusions presented in section II below.

II. PRELIMINARY CONCLUSIONS OF THE WORKING GROUP

3. The second part of the topic "Nationality in relation to the succession of States" includes the problem of the nationality of legal persons that the

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1/ The Working Group was composed as follows: Mr. Václav Mikulka (Special Rapporteur, Chairman of the Working Group); Mr. Emmanuel Akwei Addo; Mr. Husain Al-Baharna; Mr. Ian Brownlie; Mr. Enrique J.A. Candioti; Mr. Christopher John Robert Dugard; Mr. Constantin P. Economides; Mr. Zdzislaw Galicki; Mr. Gerhard Hafner; Mr. Teodor Viorel Melescanu; Mr. Igor Ivanovich Lukashuk; and Mr. Robert Rosenstock.

Commission has not yet studied. In the view of the Working Group, as the definition of the topic now stands, the issues involved in the second part are too specific and the practical need for their solution is not evident. In addition to considering the possibility of suggesting to the Commission not to undertake work on this part of the topic, the Working Group considered it useful to examine the possibility of alternative approaches, as they emerge from Part III of the Fourth report of the Special Rapporteur (document A/CN.4/489). It agreed that there are, in principle, two options for enlarging the scope of the study of problems falling within the second part of the topic, as explained below. They would both require a new formulation of the mandate for this part of the topic.

1. Nationality of legal persons in international law

4. The first option would consist in expanding the study of the question of the nationality of legal persons beyond the context of the succession of States to the question of the nationality of legal persons in international law in general. As the notion of the nationality of legal persons is not known to all legal systems, it would be advisable that the Commission examine also similar concepts on the basis of which the existence of a link analogous to that of nationality is usually established.

5. The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of the general concept of the nationality of legal persons in international relations. It would also enable the Commission to further consider in a more systematic manner the problems it has been confronted with when studying the topics of State responsibility, Diplomatic protection and Succession of States.

6. The problems that the Commission could encounter, in opting for this approach, would be the fact that, due to the wide diversity of national laws in this respect, the Commission would be confronted with problems similar to those that have arisen during the consideration of the topic of Jurisdictional immunities. There would also be a certain overlap with the topic of Diplomatic protection. Moreover, such study would lend itself to a more theoretical analysis than to the development of rules of immediate practical applicability. But above all, the enormity of such a task should not be underestimated. It would be difficult to keep the study within manageable

2. Status of legal persons in relation to the succession of States

7. The second possibility would consist in keeping the study within the context of the succession of States, but going beyond the problem of nationality to include other questions, such as the status of legal persons (in particular rights and obligations inherent to the legal capacity of legal persons, including those determining the type of legal person etc.) and, possibly, also the conditions of operation of legal persons flowing from the succession of States.

8. The benefits of such an approach would be, in the view of the Working Group, that it would contribute to the clarification of a broader area of the law of the succession of States.

9. The problems that the Commission could encounter, in opting for this approach, would be the fact that the Commission would be confronted with the wide diversity of national laws in this respect. Once enlarged in this direction, it would, moreover, be difficult to establish a new delimitation of the topic.

* * *

10. If work is continued, the Commission has further to decide which categories of "legal persons" should be covered by the study, to which legal relations the study should be limited and what could be the possible outcome of the work of the Commission on this part of the topic.

11. In the absence of positive comments from States, the Commission would have to conclude that States are not interested in the study of the second part of the topic. The Commission should, in its report, remind the General Assembly of the desirability of obtaining the reaction of States on the question asked in paragraph 5 of General Assembly resolution 52/156 of 15 December 1997. The Assembly should, in particular, invite States having undergone a succession of States, to indicate, e.g., how the nationality of legal persons was determined, what kind of treatment was granted to the legal persons which, as a result of the succession of States became "foreign" legal persons, etc.

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NATIONALITY IN RELATION TO THE SUCCESSION OF STATES

Report of the Working Group

Corrigendum

Page 3, paragraph 9

The first sentence of paragraph 9 should read as follows:

"In opting for this approach, the Commission would be confronted with the problem of the wide diversity of national laws in this respect.".

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UNILATERAL ACTS OF STATES

Report of the Working Group

1. The General Assembly, in resolution 52/156 of 15 December 1997, endorsed the decision of the International Law Commission to include in its agenda the topic "Unilateral Acts of States".

2. At its fiftieth session, the Commission had before it the first report of its Special Rapporteur, Mr. Víctor Rodríguez-Cedeño, contained in document A/CN.4/486, and considered it at its 2534th to 2527th meetings, on 5 to 8 May 1998.

3. As a result of its discussion, the Commission, at its 2527th meeting, decided to reconvene the Working Group on Unilateral Acts of States. 1/

4. The Group held two meetings on 18 and 19 May 1998.

5. As regards the scope of the topic, there was general endorsement of the approach taken by the Special Rapporteur in his report, which concurred with the outline adopted by the Commission at its previous session, and which limited the topic to unilateral acts of States issued for the purpose of producing international legal effects. This excluded from the topic's scope

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1/ For the composition of the Working Group, see above, chapter I.

acts of States of a purely non-legal nature, unilateral acts of the State which are linked to a specific legal regime and acts of other subjects of international law, such as acts of international organizations.

6. Opinions differed as to whether the scope to the topic extended to unilateral acts of States issued in respect of subjects of international law other than States or erga omnes, and on whether, under the present topic, the effects of unilateral acts issued in respect of States could also be extended to other subjects of international law. It was felt, however, that at this stage, work could proceed without making a final decision on the matter, subject to further examination of this question by the Special Rapporteur and the Commission in Plenary and its further clarification in due course.

7. As to the form which the work of the Commission on the topic should adopt, it was generally felt that the elaboration of possible draft articles with commentaries on the matter was the most appropriate way to proceed. This would ensure the advantages of conciseness, clarity, compactness and systematization of a codification exercise, without necessarily prejudging on the final legal status which might be reserved for such draft articles, namely, a convention, guidelines, restatement or any other outcome.

8. Taking into account the discussion in Plenary as well as in the Working Group it was felt that the Special Rapporteur might already be in a position to produce a number of draft articles. One, on scope, stating that the draft articles would apply to unilateral acts of States. Another draft article, on use of terms, stating that a unilateral act [declaration] is an autonomous [unequivocal] and notorious expression of the will of a State, issued for the purpose of producing international legal effects. And another draft article, laying down that the fact that the draft articles did not apply to unilateral acts of the State which are linked to a pre-existing international agreement, such as, for instance, acts governed by the Law of Treaties, by the Law of the Sea, by the law of international arbitral or judicial procedure or by other specific legal regimes, neither to acts of subjects of international law other than the State, was without prejudice to the application to them of any of the rules set forth in the draft articles to which they would be subject under international law, independently of the draft articles.

9. It was also generally agreed in the Working Group that the elaboration of aspects related to the element of the above definition consisting in the "purpose of producing legal effects" was well within the topic but pertained

also to some other section of the draft articles, such as the effects of unilateral acts. This would cover the study of possible effects of the act, such as the creation of international obligations for the State issuing the act, (namely, promise) the renunciation of its rights, and the declaration of opposability or not opposability to it of the claim of another State or of a particular legal situation (namely, recognition or protest). It would also cover the question whether it would be necessary or not, in order for the act to produce legal effects, for the addressee to accept it or subsequently behave in such a way as to signify such acceptance.

10. It was also felt that, taken into account the views expressed in Plenary, the question of estoppel and the question of silence should be examined by the Special Rapporteur, at the appropriate time, with a view to determining what rules, if any, could be formulated in this respect, in the context of the unilateral acts of States.

11. As regards the future work of the Special Rapporteur, the Working Group recommends that the Commission could request the Special Rapporteur, when preparing his second report, to submit draft articles on the definition of unilateral acts and the scope of the draft articles, taking as a basis the considerations contained in the present report of the Working Group. He could also proceed further with the examination of the topic, focusing on aspects concerning the elaboration and conditions of validity of the unilateral acts [declarations] of States. 2/

2/ The Working Group also considered whether the topic should be confined to the study of unilateral declarations of States. While some members were in favour of limiting the scope of the topic to declarations, as proposed by the Special Rapporteur in his first report, others were of the view that the scope of the topic was broader than declarations and should encompass other unilateral expressions of the will of the State under the general label of unilateral acts.